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APPENDIX.

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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
31

PAUL M. BROCKINGTON,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OHIO.

Filed January 8, 1969.

Probable Jurisdiction Noted February 24, 1969.

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Case No. 863,239.

IN THE COURT OF COMMON PLEAS

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

April Term, 1968.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,

Relator,

v.

JAMES A. RHODES, *et al.*,

Respondents.

RELEVANT DOCKET ENTRIES IN PROCEEDINGS BELOW.

Jul. 10, 1968 Petition, application for temporary restraining order, application for alternative writ of mandamus and precipe filed and:

To Court

Whereupon alternative writ of mandamus and summons issued to Sheriff of Franklin County for defendants James A. Rhodes, Ted W. Brown, William B. Saxbe, and alternative writ of mandamus and summons issued to Sheriff of Cuyahoga County for all other defendants.

Jul. 25, 1968 Demurrer of Respondents Carney, Duffy, Hughes, Stillman and Cipollone filed.

Jul. 29, 1968 Motion by Respondents Rhodes, Brown and Saxbe to quash filed.

Jul. 30, 1968 Relator's Brief in Opposition to demurrer of Respondents, Carney, Duffy, Hughes, Stillman and Cipollone.

Jul. 30, 1968 Relator's Brief in answer to motion to quash filed by Respondents Rhodes, Brown and Saxbe filed.

Jul. 30, 1968 To Court

Demurrer of Respondents Carney, Duffy, Hughes, Stillman and Cipollone overruled.

Motion to Quash of Respondents of Rhodes, Brown and Saxbe overruled.

Jul. 31, 1968 Answer of Respondents Carney, Duffy, Hughes, Stillman and Cipollone filed.

Aug. 1, 1968 Answer of Respondents Rhodes, Brown and Saxbe filed.

Aug. 6, 1968 Trial Brief of Relator filed.

To Court:

Heard and Submitted.

To Court:

Relators' Brief on merits filed. Respondents to file answer brief by or before August 13, 1968. Relator to file reply brief on or before August 15, 1968.

Aug. 12, 1968 Post trial brief of Respondents Carney, Duffy, Hughes, Stillman and Cipollone filed.

Aug. 13, 1968 Post trial brief of Respondents Rhodes, Brown, and Saxbe filed.

Aug. 15, 1968 Reply brief of Relator filed.

Aug. 22, 1968 Memorandum of opinion by Judge Jackson filed.

Aug. 27, 1968 Notice of Appeal filed.

PETITION FOR A WRIT OF MANDAMUS IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Filed July 10, 1968; title omitted in printing.)

1. For his cause of action relator Paul M. Brockington says that he is a citizen and elector of the State of Ohio; that he resides in the City of Cleveland within the Twenty-First Congressional District of Ohio; that he is more than 25 years of age and has been a citizen of the United States for more than seven (7) years. Relator is an independent candidate for the office of United States Representative from the Twenty-First Congressional District of Ohio in the November 5, 1968, general election.

2. Respondent James A. Rhodes, as are his successors in office, is sued in his representative capacity as the duly elected, qualified, and acting Governor of the State of Ohio with his office and official residence in Columbus, Ohio. The Governor of Ohio is charged with the general duty of enforcing the statutes of the State of Ohio and with particular responsibility under Section 3505.38 of the Ohio Revised Code for signing the certificate of election issued by the Secretary of the State of Ohio to those persons declared duly elected to the office of United States Representative.

3. Respondent Ted W. Brown, as are his successors in office, is sued in his representative capacity as the duly elected, qualified, and acting Secretary of State of Ohio with his office and official residence in Columbus, Ohio and his county office in Cleveland, Ohio at the Cuyahoga County Board of Elections. He is the chief election officer of Ohio under Section 3501.04, Ohio Revised Code. Section 3505.38 of the Ohio Revised Code requires him to issue certificates of election to those persons declared elected to office, including the office of United States Representative. The Secretary of State certifies the form of the ballots for general elections, together with the names of the candidates to be printed thereon, seventy five days before the elections are held. Section 3505.01 of the Ohio Revised Code.

4. Respondent William B. Saxbe, as are his successors in office, is sued in his representative capacity as the duly elected, qualified, and acting Attorney-General of the State of Ohio with his office and official residence in Columbus, Ohio. He is the chief law officer for the State of Ohio. Section 109.02 of the Ohio Revised Code. He has certain specific duties with respect to Ohio election procedure. Sections 3505.35, 3519.01, 3513.06, 3513.271, and 3515.13 of the Ohio Revised Code.

5. Respondent Joseph A. Cipollone, as are his successors in office, is sued individually and in his representative capacity as the duly appointed director of the Board of Elections of Cuyahoga County. Respondents Carney,

Duffy, Hughes and Stillman, as are their successors in office, are sued individually and in their representative capacity as members of the Cuyahoga County Board of Elections and as agents of the Secretary of State of Ohio, for the conduct of elections in Cuyahoga County. Independent candidates for the office of District Representative to Congress must file their nominating petitions with the various Boards of Elections. Section 3513.05 of the Ohio Revised Code. The Board of Elections determines the sufficiency of the signatures on the petition papers. Section 3513.262 of the Ohio Revised Code.

6. Candidates for party nomination to the office of United States Representative from Ohio Congressional Districts have their names printed on the ballot in primary elections of their party by filing with the Boards of Elections only 100 valid signatures. Section 3513.05 of the Ohio Revised Code. The names of those party candidates who win the primary elections are then placed on the ballot in the general elections.

7. Section 3513.257 of the Ohio Revised Code requires that independent candidates for the office of United States Representative file nominating petitions containing the valid signatures of qualified electors in a number equal to "not less than seven percent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district." Under prior Ohio statutes and until January 1, 1952, independent candidates for United States Representative could be nominated and placed on the ballot by obtaining signatures of one percent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district.

8. Relator says that he circulated and caused to be circulated on his behalf nominating petitions in order to place his name on the ballot in the November 5, 1968, general election as an independent candidate for the office of United States Representative from the Twenty-First Congressional District of Ohio.

9. Relator says that on or about February 19, 1968, within the time fixed by special statute, he filed nominating petitions bearing 899 valid signatures with the Board of Elections pursuant to Section 3513.05 of the Ohio Revised Code.

10. Relator further states that on or about June 27, 1968, he received a letter from the respondent director of the Cuyahoga County Board of Elections, written on behalf of the respondent members thereof, informing him that his nominating petition had been found insufficient in that it did not fulfill the seven percent requirement of 5,974 signatures for the Twenty-First Congressional District. A copy of the said letter is marked Exhibit A, attached hereto and incorporated as part of this petition.

11. Relator says that he objected to the said finding of insufficiency, that he asked for a hearing with the respondent members of the Cuyahoga County Board of Elections, but that the said respondents affirmed their decision, holding his petition insufficient, and barring him from the ballot in the November 5, 1968, general election as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District.

12. Relator says that the said seven percent requirement is unreasonably high and excessive, that it is disproportionate when compared to the 100 signatures required for party candidates, that it is arbitrary and capricious, that it constitutes an invidious discrimination without any relationship to constitutionally justified ends, that its effect is to disfranchise relator and other independent voters, and that it is therefore unconstitutional and void.

13. Relator says that the said seven percent requirement, first included in an amendment to Section 4785-91 of the Ohio General Code and later incorporated in Section 3513.257 of the Ohio Revised Code, being void and unconstitutional, the proper criterion for determining the sufficiency of his petition is the one percent requirement

previously adopted and enacted into law by the Ohio Senate and General Assembly.

14. Relator says that he filed valid signatures on his nominating petition numbering in excess of one percent of the number of voters for governor in the Ohio Twenty-First Congressional District in the last gubernatorial election (see Exhibit A); that he has therefore qualified as an independent candidate for Congress in the said district; that the respondent members and director of the Board of Elections of Cuyahoga County have a clear, absolute, unequivocal, specific, and mandatory duty to certify the sufficiency of relator's petition and to do all things necessary to have his name placed on the ballot; that the respondent Secretary of State has a clear, absolute, unequivocal, specific, and mandatory duty to certify relator's name on the ballot; that the respondents Governor of the State of Ohio and Attorney-General of the State of Ohio have a clear, absolute, unequivocal, specific, and mandatory duty to enforce the statutes of the State of Ohio and to maintain, implement, execute, protect, and defend the right of relator as an independent candidate for political office in Ohio to have his name printed on the ballot on the basis of constitutionally acceptable signature requirements as provided by law.

15. Relator says that unless he is duly certified as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District, his fundamental constitutional rights will be abridged, to wit:

a. His basic constitutional right to be a candidate for an office for which he is otherwise qualified. Article I, Section II of the United States Constitution.

b. His right to Equal Protection of the Laws guaranteed by Amendment XIV of the United States Constitution, a right abridged by the seven percent requirement for independent candidates set forth in Section 3513.257 of the Ohio Revised Code.

c. His right to Due Process of Law guaranteed by Amendment XIV of the United States Constitution but vitiated by the imposition of restrictive and repressive electoral legislation designed to prevent independent candidates from seeking political office in Ohio and devised to disfranchise independent voters who are unwilling to vote for the party candidates.

d. His right to free speech as a duly qualified political candidate for office, guaranteed by Amendment I of the United States Constitution.

e. His right to run for political office and to vote for a candidate of his choice, rights guaranteed citizens of the United States by the privileges and immunities clause of Article IV, Section II and Amendment XIV of the United States Constitution.

f. His right to participate in a republican form of government guaranteed by Article IV, Section IV of the United States Constitution.

g. His right to equal protection and benefit of government with no special privileges granted to others, a right guaranteed by Article I, Section II of the Ohio Constitution.

16. Relator says that unless this Court issues a temporary restraining order as hereinafter requested, the respondent members and deputy of the Board of Elections will, in the ordinary course of events, cause to be commenced the printing of ballots for the November 5, 1968, election, without including thereon the name of relator as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District; and should this Court determine that relator's name should properly be placed upon the ballot, then the printing of the said ballots without his name will have been for nought.

17. Relator says he has no plain and adequate remedy in the ordinary course of the law.

WHEREFORE, relator prays that this Court:

1. Issue an immediate order restraining the respondent members and director of the Board of Elections of Cuyahoga County and their agents and employees from printing or causing to be printed ballots for the office of United States House of Representatives from the Ohio Twenty-First Congressional District for the November 5, 1968, election until further order of this Court.

2. Issue a Writ of Mandamus commanding the respondent members and deputy of the Board of Elections of Cuyahoga County to certify the sufficiency of relator's nominating petition and directing all respondents herein to do all things necessary to place relator's name upon the ballot as an independent candidate for United States House of Representatives from the Ohio Twenty-First Congressional District in the November 5, 1968, general election; or in the alternative, show cause in this Court, at a time to be fixed, why they should not be required to do so.

3. Give judgment to relator against the respondents herein for relator's costs and expenses, including reasonable attorneys' fees, incurred in connection with this action, and for such other and further relief as may be proper.

BENJAMIN B. SHEERER,
RUDD, OBER & MILLER,
JERRY GORDON,
Attorneys for Relator.

(Jurat omitted in printing.)

JOINT ANSWER OF RESPONDENTS CIPOLLONE, CARNEY, DUFFY, HUGHES AND STILLMAN, IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Filed July 31, 1968; title omitted in printing.)

Now come the Respondents, Joseph A. Cipollone, John J. Carney, Dan W. Duffy, Robert A. Hughes, and Saul G. Stillman, and for their joint answer to the petition herein, admit the allegations of numbered paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11 of said petition.

Further answering, the said Respondents deny each and every, all and sundry, the allegations, statements and averments contained in the petition, except for those herein specifically admitted to be true.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

By JOHN L. DOWLING,
Assistant Prosecuting Attorney,
Attorneys for Respondents.

(Jurat omitted in printing.)

ANSWER IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Filed July 31, 1968; title omitted in printing.)

Now come the defendants James A. Rhodes, Ted W. Brown, and William B. Saxbe, not intending to waive their previous objections to the jurisdiction of this Court and for their answer say:

1. These respondents admit that James A. Rhodes is the duly elected, qualified, and acting Governor of the State of Ohio with his office and official residence in Columbus, Ohio.

2. These respondents admit that Ted W. Brown is the duly elected, qualified, and acting Secretary of State of Ohio with his office and official residence in Columbus, Ohio.

3. These respondents admit that William B. Saxbe is the duly elected, qualified, and acting Attorney General of the State of Ohio with his office and official residence in Columbus, Ohio.

4. These respondents admit that, by the requirements of Section 3513.257, Revised Code, the nominating petition of an independent candidate for the office of district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district.

5. Respondents admit the existence of Sections 3505.38, 3501.04, 3505.01, 109.02, 3505.35, 3519.01, 3513.06, 3513.271, 3513.13, 3513.05, 3513.262, 3513.257, Revised Code, but respondents do not agree with all the interpretations alleged by relator in connection with said sections.

6. Respondents generally deny all other allegations made in the petition not specifically admitted herein.

Respondents answering further state that the relator has failed to allege facts that make it clearly appear that the performance of the act sought by him is one which the law *specially* enjoins as a duty resulting from an office, trust, or station of these respondents.

Wherefore these respondents pray that the petition for a writ of mandamus and application for a temporary restraining order be dismissed with costs to the relator.

Respectfully submitted,

WILLIAM B. SAXBE,
Attorney General,

JULIUS J. NEMETH,
Assistant Attorney General,

WILLIAM J. LEE,
Assistant Attorney General,

Attorneys for Respondents
Rhodes, Brown and Saxbe.

(Certificate of service omitted in printing.)

RELATOR'S BILL OF EXCEPTIONS IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY.

(Title omitted in printing.)

* * * * *

(3)

BE IT REMEMBERED, That at the April, A.D. 1968 Term of said Court, to-wit, on the 6th day of August, 1968, this cause came on to be heard before the Hon. Perry B. Jackson, one of the Judges of said Court, in Courtroom Number Thirteen.

Thereupon, the following proceedings were had:

The Court: Good morning. The Plaintiff may make an opening statement, if he so desires, or Relator.

Mr. Gordon: Thank you, your Honor.

The Court: Is there a separation of witnesses desired?

Mr. Gordon: We have no request for same.

Mr. Dowling: None from the Board of (4) Elections.

The Court: All right.

Mr. Nemeth: None from us.

(Thereupon, opening statements were made by Mr. Gordon and Mr. Dowling on behalf of their respective clients, after which the following proceedings were had:)

Mr. Nemeth: The Attorney General waives opening statement.

The Court: I didn't hear it.

Mr. Nemeth: The Attorney General's office waives opening statement.

The Court: The Relator may call its first witness.

Mr. Gordon: Your Honor, Relator calls John Schimmels under the statute for cross-examination.

(5) Thereupon, the Relator called as a witness on cross-examination JOHN H. SCHIMMELS, who, being first duly sworn, testified as follows:

CROSS EXAMINATION OF JOHN H. SCHIMMELS.

The Court: You have to speak up a little loud. We have got a fan going here and everything else, trying to keep as cool as we can. Speak as loud as you can.

The Witness: All right.

By Mr. Gordon:

Q. Will you please state your full name? A. John H. Schimmels, S-c-h-i-m-m-e-l-s.

Q. Where do you reside, Mr. Schimmels? A. Cleveland Heights, 1637 Glenmont Road, Cleveland Heights 18.

Q. And where are you employed? A. Board of Elections.

Q. And that would be the Board of Elections of Cuyahoga County? A. Cuyahoga County, yes, sir.

Q. Where are they located? A. 623 St. Clair Avenue.

Q. And how long have you been so employed? A. Since February 5th of 1968.

Q. And, Mr. Schimmels, what is your capacity there at the (6) Board of Elections? A. I am in charge of the Ballot Department and also the check of the petitions.

Q. And can you briefly tell us what some of your duties are? A. Well, basically, the idea of making up the ballot and make sure that it is correct and prior to making up the ballot petitions are filed to run as candidate for an office, these petitions are first checked at the Registration Department and the final check comes downstairs where I double check or triple check, in many cases, any cause for error.

Q. Now, who is the Deputy Director of the Board of Elections of Cuyahoga County, Ohio? A. Mr. Paul DeGrandis.

Q. And who is the Director? A. Mr. Joseph Cipollone.

Q. Who are the members of the Board of Elections of Cuyahoga County? A. Mr. Dan Duffy, Mr. Jim Carney or Jim Carney, yes.

The Court: James.

A. James.

Mr. Dowling: It is actually John, your Honor.

A. Mr. Saul Stillman and Mr. Robert Hughes.

Q. And the members of the Board of Elections are appointed, (7) are they not, by the Secretary of State? A. Yes.

Q. And that would be Mr. Ted W. Brown? A. Yes.

Q. Now, Mr. Schimmels, do you know of your own personal knowledge as to whether Mr. Paul Brockington filed a nominating petition as an independent candidate for the 22nd Congressional District on February 19th of this year? A. He did.

Q. And isn't it a fact that by virtue of special state statute stemming from the redistricting that February 19th was a timely date to file nominating petitions?

Mr. Dowling: Object to the form of the question and actually at this point, your Honor, I have to object to cross-examination of this witness, since there is no showing that the particular acts complained of in here are done through this agent and that he is subject to cross-examination. That is, only the Board can undertake the qualification or disqualification of nominating petitions.

Mr. Gordon: Your Honor, I'd like to inform the Court that we had subpoenaed Mr. Cipollone and that Mr. Cipollone requested that he be excused from subpoena in order to attend the convention at (8) Miami, and that we agreed to this request conditioned upon his producing for this hearing an authorized agent, and I think that under the circumstances we should certainly be permitted to cross-examine.

Mr. Dowling: Mr. Cipollone would not properly be cross-examined as to official action of the Board of Elections, your Honor.

The Court: Well, someone would have the record, official record of the Board of Elections, the minutes.

Mr. Dowling: Yes, your Honor, I think we can go to that, but what I object to is the cross-examination of a man who does not qualify under the statute, whom the Relator is not qualified under the statute to cross-examine as an agent by whom something was done by the principal.

Mr. Gordon: Well, your Honor, as I indicate, the original subpoena went to Mr. Cipollone, who is a named Respondent, and certainly he as Director of the Board of Elections is an authorized agent and I think in view of the fact that we cooperated with Mr. Cipollone in agreeing not to enforce that subpoena that it would be taking undue advantage of us to preclude us this cross-examination of this witness who appears in his stead.

(9) Mr. Dowling: Well, I was no party to a stipulation that somebody else could appear for Cipollone. As a matter of fact, I don't even know whether, as or if a subpoena was served on Cipollone, your Honor.

The Court: Are you objecting to all cross-examination or just on specific points over which he has no control?

Mr. Dowling: Yes, I object to all cross-examination, your Honor, because, number one, Mr. Schimmels is not a party to this lawsuit; number two, there is no showing that he acted as an agent. As a matter of fact, the statutory duties of the Board of Elections can not be delegated to an agent. The statutory duty would be the acceptance or rejection of the nominating petitions in this case.

The Court: Well, he can testify as to what he, himself, did.

Mr. Dowling: Yes, your Honor, I would—on direct examination, not cross. Yes.

The Court: Sustain the objection.

Mr. Dowling: Your Honor, sustain the objection?

The Court: Yes.
Mr. Dowling: Thank you.

(10) Q. All right. Mr. Schimmels, can you tell us whether filing petitions on February 19th was timely? A. That was the last day for filing those petitions, yes.

Q. And was Mr. Brockington's petitions filed on that date? A. I don't remember the exact date. It could have been before the 19th.

Q. Well, let me ask you this: In the course of examining and considering his petition was any question ever raised, to your knowledge, concerning whether or not it was timely filed? A. Not to my knowledge.

Q. Now, Mr. Schimmels, in the course of your work at the Board of Elections have you had occasion to see Mr. Cipollone's signature? A. Yes.

The Court: In the joint answer of the Board of Elections Mr. Cipollone admits the allegation of Paragraph 9, which relates to that on or about February 19th, the time fixed by the special statute, Relator filed nominating petitions, and it also includes the admission, Paragraph 10 of Relator's petition that he alleges that on the 27th of June, '68, received his letter from Respondent Director relating to not complying, and also 11 (11) in the objection to the finding of the Board of Elections, so those are admitted by the prosecutor representing the officials of the Board of Elections, so it is not necessary for Relator to prove those.

Now, as the Court understands it, the assignment of Relator is to prove to the Court that the number of signatures is proper under the provisions of the Constitution, and frankly it almost boils down to questions of law rather than—unless Plaintiff has some—Relator has some of that, the intent of the legislators at the time, how it is possible to show that at the time the law was passed what was in the minds of the legislators by certain discussions in their committee hearings and so forth, to go back in to see what was

the intent of the legislators in fixing seven per cent as against the original one per cent.

Now, if you have any evidence on that point, the Court would be interested in hearing testimony as to that, but as far as what took place at the Board of Elections it seems to the Court that the Board—that the prosecutor has admitted everything that Relator says happened at the Board of Elections.

Mr. Gordon: Yes, that's true, your Honor. The only reason that we are pursuing this line of (12) inquiry is because we have other Respondents in the case, the Governor, the Secretary of State and the Attorney General, who have not made such admissions. Now, if they are prepared to stipulate, then of course this present line of inquiry would not be necessary. That's been our problem.

Mr. Dowling: Essentially all that they admit is the provision of the statute.

The Court: Yes. Does the Attorney General on behalf of the state officers desire at this time to admit the matters that took place at the Board of Elections, without waiving your further contentions, of course, that the state officers are not involved?

Mr. Nemeth: Yes, your Honor, I believe we can do that.

The Court: All right. Is that satisfactory?

Mr. Gordon: That is, your Honor.

The Court: Let the record show that the Attorney General on behalf of the named Respondents, Governor Rhodes, the Attorney General and the Secretary of State admit the same as the Board of Elections representatives as to what took place at the Board of Elections. (13) Does that state it properly?

Mr. Nemeth: Yes, your Honor.

The Court: Is that correct?

Mr. Nemeth: Yes.

Mr. Gordon: All right, your Honor. I think we can conclude our questioning rather briefly. I would like to have this marked, as Relator's Exhibit 1.

A letter was marked as Relator's Exhibit 1, for identification.

Q. Mr. Schimmels, handing you what has been marked for identification as Relator's Exhibit 1, I ask you, sir, do you recognize the signature on that letter? A. Yes.

Mr. Dowling: Your Honor, I think I could save a little time by saying that we are willing to stipulate to the authenticity and admissibility and everything else with regard to that document.

The Court: All right. May I see it?

Mr. Gordon: All right. We will offer this in evidence, your Honor.

The Court: Does the Attorney General also (14) stipulate?

Mr. Nemeth: Yes, your Honor.

The Court: All right. Let the record show that the Attorney General, the County Prosecutor and Relator's attorney stipulate that Relator's Exhibit Number 1 may be received.

Q. All right. Mr. Schimmels, just one more matter and I think we will be concluded. Did you at our request bring to this Court the figures from the Board of Elections showing the vote for Governor in each of the four Congressional Districts from Cuyahoga County? A. Yes.

Q. And would you please give us those figures by District?

Mr. Dowling: Your Honor, since we are involved with the 21st District, I fail to see any relevance to the 20th, 22nd or 23rd.

Mr. Gordon: Your Honor, I think it is basic that in challenging the constitutionality of a law, this is under the Stromberg case, and under the Thornhill versus Alabama we are entitled to test all the possible applications of the statute including to other persons and this is quite important in this lawsuit, that we know the statistics in the other Congressional Districts. (15) It is a matter of public record, although hard for us to come by.

The Court: Overrule the objection.

Q. All right. Will you please indicate—

Mr. Dowling: Your Honor, if I may, I was just going to argue to the Court that there is no allegation in this petition that seven per cent is required of Paul Brockington or any other candidate in the 21st and not required of candidates in the 22nd, 23rd or the 1st to the 19th, as the case may be.

The Court: Now, this is a general provision that applies pretty generally to most of the candidates that might file as independents; the County Commissioners, state officers, judges and so forth.

Mr. Gordon: All right.

The Court: I think that may be answered.

Q. All right. Would you give us those figures, please? A. In the 20th Congressional district, the total votes for Governor of November 8, 1966, 79,585. The 21st Congressional District, 90,507. In the 22nd Congressional District, 139,322 and in the 23rd Congressional District, 146,863.

Mr. Gordon: Thank you very much. No further (16) questions.

The Court: All right. You may be excused.

Mr. Gordon: If it please the Court, Relator calls the Relator, Paul Brockington.

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(17) Thereupon, the Relator, further to maintain the issues on his part to be maintained, offered himself as a witness, who, being first duly sworn, testified as follows:

DIRECT EXAMINATION OF PAUL M. BROCKINGTON.

By Mr. Sheerer:

Q. Will you state your name, please? A. My name is Paul M. Brockington.

Q. And your address? A. 12815 Austin Avenue, Cleveland 8, Ohio.

Q. How long have you resided at this address? A. A little more than four years.

Q. And before that where did you reside? A. 744 East 127th Street.

Q. Is that in Cleveland? A. Cleveland 8, Ohio.

Q. How long have you been a resident of the state of Ohio? A. Seven years.

Q. Pardon me? A. Seven years.

Q. Tell the Court your place of birth. A. Okahumpka, Florida.

Q. And the year? A. 1923.

Q. You are presently how old? **(18)** A. 45.

Q. Are you married? A. Yes, I am.

Q. Do you have children? A. Three; two boys and one girl.

Q. Do they reside with you? A. Yes.

Q. Briefly tell the Court your education, what education you have. A. Well, I have a B.S. degree—

Mr. Dowling: Object, your Honor.

Q. And what? A. A master's degree, an A. M. degree.

The Court: It is not necessary. That isn't one of the requirements or the qualifications for public office.

Mr. Sheerer: That is true, your Honor, but the Respondents have said that they wanted to see that our Relator was flesh and blood and—

The Court: All right, we will let it stand. It is not necessary to continue it, to go into anything except his qualifications as provided by the law.

Q. Did there come a time in this year, 1968, that you decided to run for office? **(19)** A. Beg your pardon?

Q. Did there come a time in the year of 1968 that you decided to run for office? A. Yes.

Q. What office was that? A. The office of Congress of the 21st District.

Q. In what manner were you going to run for that office? A. As an independent.

Q. To that end did you secure nominating petitions? A. I did.

Q. And did you circulate them? A. Yes.

Q. And file them with the Board of Elections A. I did.

Q. Will you briefly describe how your petitions were circulated? A. Well, I—

The Court: Unless you want to get something in the record, I think that the Board of Elections—has stipulated—

Mr. Dowling: Yes, your Honor.

The Court: —stipulated everything with relation to that and unless the Attorney General wants to—

Mr. Dowling: There is no issue, I believe, (20) your Honor, as to the fact that a certain number, 800 and some odd signatures were found to be valid; that the petitions were valid to that extent and that the petition has not raised any question with regard to invalidating certain petitions.

The Court: Well this is further examination to show that he is flesh and blood, well qualified to be in Congress. Someone reviewing the record might raise the question if he only had a third grade education, or something like that, that might influence them.

Mr. Dowling: Not our Appellate Court, your Honor.

The Court: I am sure not.

Mr. Sherrer: That would conclude our examination, your Honor.

The Court: Do you desire to cross-examine the Relator?

Mr. Dowling: Possibly one or two questions, your Honor.

CROSS EXAMINATION OF PAUL M. BROCKINGTON.

By Mr. Dowling:

Q. Mr. Brockington, were you a candidate for any other office in this year of 1968? A. No, I was not.

(21) Q. Did you file petitions with the Board of Elections for any other office in this year of 1968? A. I did not.

Q. Did you vote in the primary election held in May of this year? A. I did, yes.

Mr. Gordon: Object.

The Court: Overruled.

Mr. Gordon: Object as to how he votes, your Honor. That is his private prerogative.

The Court: Overruled.

Mr. Dowling: It is a matter of public record if he voted in the primary.

The Court: Overruled.

Q. You voted in the Democratic primary, sir? A. Yes.

Q. That was in May of 1968? A. Yes.

Q. And that was after you had filed your petitions as an independent candidate for Congress? A. Yes.

The Court: But you did not file in the Democratic primary for this office?

A. No.

Q. If I may be permitted, your Honor, I would just like (22) to check my notes for a moment or two. Have you continuously resided in the United States since your birth? A. Yes.

Mr. Dowling: No further questions, your Honor.

The Court: What is your occupation, Mr. Brockington?

A. I am an educator and administrator—

The Court: In the what?

A. In the—

The Court: Public schools?

A. Poverty programs.

The Court: Any questions?

Mr. Nemeth: No questions.

The Court: Anything further?

Mr. Sheerer: Just a question, your Honor.

RE-DIRECT EXAMINATION OF PAUL M. BROCKINGTON.

By Mr. Sheerer:

Q. On February 19, 1968, when you filed your petitions with the Board of Elections, was any indication given to you at that time of their sufficiency? A. No.

Q. Was any question raised as to the number of signatures at that time? A. No.

(23) Q. Were you told at that time that you had enough signatures?

Mr. Dowling: Object.

A. No.

The Court: It doesn't make any difference, anyway. These are administerial employees that take the petitions. The Board of Elections itself certifies that he had a certain number of signatures and of course—all right, anything further?

Mr. Sheerer: That would conclude it.

Mr. Dowling: Do you rest?

Mr. Gordon: Your Honor, the Relator rests.

The Court: Any evidence on behalf of any of the Respondents?

Mr. Dowling: Your Honor, the Board of Elections and Joseph Cipollone rest.

Mr. Nemeth: The State of Ohio rests.

The Court: Argument?

Mr. Gordon: Yes, your Honor. First of all I would like to tell the Court that this morning on our way up here we filed a brief and it has been filed and docketed and I want to make it available to the Court, here.

The Court: It looks rather voluminous.

Mr. Gordon: It will give you some reading matter for the hot summer months.

(24) The Court: I assume this brief, a copy of it has been given to Respondents.

Mr. Gordon: Yes, it has, your Honor, right now.

(Thereupon, closing arguments were made to the Court by counsel for the respective parties, at the end of which the following proceedings were had:)

The Court: Gentlemen, the Court thanks you. This is an interesting and important question. The Court will mark it heard and submitted. After receiving the briefs I will render a decision.

There is no question in the Court's mind, I don't think as far as the evidence is concerned, that the Relator, Paul M. Brockington, is qualified as far as the Constitution goes for holding such an office. The question primarily is one whether the legislative provision for seven per cent is properly within the police powers of the Legislature and whether—what is the effect if the Court determines that this is an unreasonable and exorbitant requirement and what is the Court's duty with respect to the proceedings in mandamus.

The Court says this without excluding other questions that are raised both by the Relator and (25) the Respondents. Thank you very much. The matter is concluded at this point.

The above and foregoing, together with all exhibits offered and received in evidence, was all of the evidence offered and received upon the trial of the above-entitled cause in the said Court of Common Pleas in and for Cuyahoga County, Ohio.

MEMORANDUM OF OPINION.

(August 22, 1968.)

Case No. 863,239.

IN THE COURT OF COMMON PLEAS.

STATE OF OHIO, COUNTY OF CUYAHOGA, SS.

STATE OF OHIO, ON THE RELATION OF PAUL M. BROCKINGTON,

Relator,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO, *et al.*,

Respondents.

PERRY B. JACKSON, *J.*:

This cause, an action seeking the issuance of a writ of mandamus, came on for hearing August 8, 1968.

Relator, Paul M. Brockington, on February 19, 1968, filed nominating petitions for the office of congressman in Ohio's 21st congressional district, with the Cuyahoga County Board of Elections, a named respondent herein. Relator sought to be placed on the November, 1968 ballot as an independent candidate.

On June 26, 1968, the Board of Elections advised relator that his petitions contained 899 valid signatures, and that the number of valid signatures required to be placed on the ballot in the November, 1968, general election was 5,974. (See relator's exhibit X-1.) Relator requested a hearing with the Board of Elections, which was granted. Following said hearing, the Board of Elections affirmed its decision, finding relator's nominating petitions to be insufficient.

On July 10, 1968, relator filed his petition for a writ of mandamus with this court, asking that Ohio Revised Code § 3513.257, which prescribes the requirements of

nominating petitions of independent candidates for the office of district representative to congress be held to be unconstitutional and that respondents be ordered to place relator's name on the ballot.

Ohio Revised Code § 3513.257, states in pertinent part:

> "The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than seven per cent of the number of electors who voted for governor at the next preceding regular state election for the office of governor in the district."

In an action in mandamus, the relator has the burden of establishing a clear right to the relief sought. He must not only establish that the act which he seeks to compel respondents to perform is one that they are constitutionally bound to perform by virtue of their offices, but also that he, the relator, has a clear right to have the duty enforced.

In the case of *State ex rel. Baker v. Hanefeld, et al.*, 134 Ohio St. 540 (1938), the Court stated that a relator

> "must establish a clear legal right to the extraordinary remedy." 134 Ohio St. 541.

Similarly, in the recent case of *State ex rel. Baines v. Parrino*, 174 Ohio St. 531 (1963), the Court stated

> "It is axiomatic that a clear legal right must be established before a writ of mandamus will issue." 174 Ohio St. 531.

The burden of establishing a clear legal right is on the relator, and if upon all of the evidence presented, relator's clear legal right is not established, the writ must be refused.

This Court finds that the relator has not established by the evidence, his legal right to have a writ of mandamus issue. Therefore, without passing on the merits of

the legal issues raised by the respective parties, the Court is of the opinion that a writ of mandamus may not issue in this case.

Writ denied.

PERRY B. JACKSON, *Judge.*

DOCKET ENTRIES IN THE COURT OF APPEALS OF CUYAHOGA COUNTY.

September 4, 1968. Transcript and original papers from Common Pleas Court filed.

September 4, 1968. Motion to advance filed.

September 4, 1968. Motion for temporary injunction filed.

September 9, 1968. Brief and Assignment of Errors and Exhibit of Relator-Appellant (2) copies filed.

September 11, 1968. Brief of Respondents-Appellees (2) copies filed.

September 12, 1968. Relator's Bill of Exceptions filed.

September 12, 1968. Motion for order placing Relator-Appellant's name on ballot filed.

September 13, 1968. No. 19,273. To Court: Motion by appellant to advance cause for hearing granted. Appellant to file brief by September 14, 1968; Appellees to file brief by September 17, 1968, after which the case will be set down for an early hearing. Exceptions. (Signed) Daniel H. Wasserman, Chief Justice. Received for filing September 13, 1968. E. J. Masgay, Clerk By H. Kwarciany, Deputy. (Journal Book 34, Page 466.)

September 13, 1968. No. 19,272. To Court: Motion by appellant for temporary injunction overruled. Exceptions. (Signed) Daniel H. Wasserman, Chief Justice. Received for filing Sept. 13, 1968. E. J. Masgay, Clerk

By H. Kwarciany, Deputy. (Journal Book 34, Page 467.)

September 14, 1968. Memorandum of Respondents in opposition to Motion of Relator for order placing his name on ballot (2) copies filed.

September 14, 1968. Brief of Respondents-Appellees (2) copies filed.

September 17, 1968. Relator-Appellant's reply brief (2) copies filed.

September 18, 1968. To Court: Motion by relator appellant for order placing his name on ballot. Referred to panel hearing case on merits. (Signed) Joseph H. Silbert, Presiding Judge. (Journal Book 34, Page 479.)

September 30, 1968. To Court: Motion by relator-appellant for order placing his name on ballot overruled. Exceptions. (Signed) Daniel H. Wasserman, Chief Justice. Received for filing Sept. 30, 1968. E. J. Masgay, Clerk By H. Kwarciany, Deputy. (Journal Book 34, Page 516.)

October 1, 1968. To Court: Journal Entry as follows, to-wit:

JOURNAL ENTRY OF THE COURT OF APPEALS.

No. 29,401.

IN THE COURT OF APPEALS

FOR THE EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO.

STATE OF OHIO, *ex rel.* PAUL M. BROCKINGTON,
Relator-Appellant,

vs.

JAMES A. RHODES, *et al.*,
Respondents-Appellees.

Date: October 1, 1968.

This cause came on to be heard on the appeal on question of law from the judgment of the Common Pleas Court and was argued by counsel for the parties; and upon consideration and a full reading of the entire record, the court finds no error prejudicial to the appellant and finds that the relator-appellant has shown no legal right to the relief requested. Therefore, the judgment of the Common Pleas Court is affirmed and it is ordered that appellees recover of appellant their costs herein taxed.

The court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

DOCKET ENTRIES IN THE SUPREME COURT OF OHIO.

Case No. 68-576.

THE SUPREME COURT OF OHIO,
January Term, 1968.

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

v.

JAMES A. RHODES, *et al.*,
Appellees.

October 7, 1968. Notice of Appeal, Memorandum and Certificate of Service filed.

October 10, 1968. Memorandum of Appellees, Board of Election and Certificate of Service filed.

October 14, 1968. Memorandum of Appellees, Rhodes et al., and Certificate of Service filed.

October 16, 1968. Hearing on the Motion.

October 23, 1968. Motion to Certify Record, Overruled. J. 49-100.

October 23, 1968. Dismissed sua sponte substantial constitutional question involved. J. 49-102.

October 23, 1968. Mandate Issued.

October 23, 1968. Certified copy of Entry sent Clerk.

November 18, 1968. Precipe to United States Supreme Court filed.

Jan. 6, 1969. Notice of Appeal to U. S. Supreme Court filed.

JOURNAL ENTRIES OF THE SUPREME COURT OF OHIO.

Journal 49, Page 100:

Motion for an Order Directing the Court of Appeals for Cuyahoga County to Certify Its Record.

It is ordered by the Court that this motion is overruled.

Journal 49, Page 102

Appeal from the Court of Appeals for Cuyahoga County.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

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SUPREME COURT, U. S.

JAN 8 . 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 31

STATE OF OHIO *ex rel.* PAUL M. BROCKINGTON,
Appellant,

vs.

JAMES A. RHODES, Governor of the State of Ohio,
TED W. BROWN, Secretary of State,
WILLIAM B. SAXBE, Attorney General of Ohio,
JOSEPH A. CIPOLLONE, Director,
JOHN J. CARNEY, DAN W. DUFFY, ROBERT HUGHES,
SAUL G. STILLMAN,
Members of the Cuyahoga County Board of Elections,
Appellees.

JURISDICTIONAL STATEMENT
In Support of Appeal From the Supreme Court of Ohio.

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